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No. 87-220

In The
Supreme Court of the United States
October Term, 1987

CITY OF SANTA BARBARA,

Petitioner,

vs.

WILLIAMS C. HALL and JEAN G. HALL,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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HISTORY AND JURISDICTION

Responding party agrees with the jurisdictional statement and history of the case.

PRELIMINARY STATEMENT

1. Since Rent Control, Of Necessity, Involves the Forced Transfer Of An Estate In Land From The Landlord To The Tenant, It Is Justified, If At All, Only In The Case Of An Emergency:

Rent control, in the present context, is unlike other forms of economic regulation. Of necessity, it entails the granting of an estate (in this case for life) in the land of the landlord. Regulating the price of a bottle of milk does not give the purchaser an estate in the land or buildings of the bottling company.

2. A Municipal Ordinance, Which Encroaches On The Fifth Amendment, Is Not Presumptively Valid:

Enactments of city councils and other local bodies have been repeatedly held not to carry any presumption that their factual determinations are correct. *San Christina Investment Co. v. City and County of San Francisco,* 167 Cal. 762, 770, 141 P.384 (1914); *Davis v. Los Angeles County,* 12 Cal.2d 412, 84 P.2d 1034 (1938).

This court has long recognized there is a narrower scope for the operation of the presumption of constitutionality where specific constitutional provision limits legislative power distinguished from the general due process requirements. *United States v. Carolene Products Co.,* 304 U.S. 154, 152, note 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

This court in *Nollan v. California Coastal Commission,* 483 U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), mandates a heightened level of judicial scrutiny where the government compels an "actual conveyance of property."

As will be explained in detail below, the legislation in question involves a forced transfer of 71 life estates from the landlord to the tenants.

—o—

STATEMENT OF THE CASE

Plaintiffs are residents of the City of Santa Barbara, a public entity located in the County of Santa Barbara, State of California. Plaintiffs are the owners of the Los Amigos Mobile Home Estates within the City of Santa Barbara which are rented for residential purposes.

On or about August 14, 1984, the City of Santa Barbara adopted an ordinance, a copy of which was attached to the complaint, marked Exhibit "A", and by reference thereto fully incorporated therein.

The complaint alleges that said ordinance has had the following effects:

a. The plaintiffs have been divested of their property rights in said real property to the extent that the tenants of mobile homes presently in their park, as well as their successors in interest, now have what amounts to a defeasible fee interest in the land upon which the mobile

home park is located, and the plaintiffs have at best a possibility of reverter with the obligation to administer the property for the benefit of said tenants.

b. The tenants of said mobile home park have received a windfall in that the City of Santa Barbara, acting pursuant to the ordinance hereinbefore described, effectuated a transfer of wealth from landlords to tenants including plaintiffs herein, without just compensation.

Plaintiffs are prepared to prove at the time of trial that mobile home units in plaintiffs' mobile home park are selling for up to ten times their bluebook value. That increase in numerous cases of approximately 900% in value represents the value of the estate forcibly transferred from landlord to tenant.

While defendants are in error in their contention that only two factual allegations are contained in the complaint, in many instances, including this one, only one or two factual allegations would be necessary to establish the existence of a cause of action. For example, if the City of Santa Barbara passed a law prohibiting Hispanics from using public accommodations, one would simply have to make the factual allegation that he is Hispanic in order to effectively challenge the constitutionality of the enactment.

This is an enactment against a status, i.e., the status of owner of a mobile home park. Once the status is established, the law operates inexorably to charge the fee interest of the owner with life estates transferable for value by the tenant. It is precisely this loss which is at issue in this litigation.

LEGAL ARGUMENT

I.

THE LEGISLATION CONSTITUTES AT THE LEAST A FORCED TRANSFER OF A LIFE ESTATE, AT THE OPTION OF THE TENANT, FROM THE LANDLORD TO THE TENANT.

The *Restatement of Real Property* defines a life estate as:

> "(b) . . . an estate which cannot last longer than the lives of one or more human beings, and is not terminable at any fixed or computable period of time or at the will of the conveyor."

The essence of a life estate is that it *may* last for life, not that it must last for life. *Reinhardt Estate,* 74 Cal. 365, 16 P. 13 (1887); *Taylor v. McCowan,* 154 Cal. 798, 99 P. 351 (1908).

A life estate is regarded *in the law* as superior to a leasehold, which is a chattel real, even if the term of a valid leasehold could be for a thousand years. *Jeffers v. Easton Eldridge Co.,* 113 Cal. 345, 45 P. 680 (1896); *Telegraph Avenue Corp. v. Raentich,* 205 Cal. 93, 269 P. 1109, 61 A.L.R. 306 (1928).

No particular language is required to create a life estate, *Smithe Estate,* 132 Cal. App. 2d 343, 282 P.2d 141 (1955), an estate for life can result from deed, will or from "a set of circumstances to which the law attributes this result." *2 Powell on Real Property,* page 88.

A life estate may be granted subject to a charge binding upon the life tenant to pay specified sums to others. *Haines Estate,* 150 Cal. 640, 89 P. 606 (1907).

Any one of us in law school would have recognized immediately, that the expansion of the right of a month-to-month tenant to occupy the premises for life constituted the transfer of an important interest in land to that tenant. It is only because of the prevailing dogma of the day that any other analysis could be seriously proffered or entertained.

There are only four classes of estates in land: (1) inheritable or perpetual estates; (2) life estates; (3) estates for years, and (4) estates at will. California Civil Code § 761.

By a mere process of elimination only a life estate remains.

An estate for years, which is the only conceivable alternative, is one: "the duration of which is fixed in units of a year, or multiples or divisons thereof." *Restatement of Property,* § 19 (1936).

There is no such limitation, or measuring period which now exists with respect to the occupancy of the tenants of plaintiff's mobile home park. The only conclusion that can be reached is that, at least, a life estate has been transferred to the tenants.

(A technically more correct analysis is that a statutory defeasible fee interest has been created on behalf of tenants as a group.)

In *Loeterman v. Town of Brookline,* 524 F. Supp. 1325 (D. Mass. 1982), (a rent control case) the court described a Massachusetts town's ban on evictions and recovery of possession, stating:

"The tenant has the equivalent of a life tenancy in the property."

II.

IT IS WHAT IS TAKEN FROM THE LANDLORD WHICH DETERMINES WHETHER A TAKING HAS OCCURRED.

The effect of the legislation is to execute the following conveyance:

"Landlord to Tenant A for life with a power of appointment to Tenant B for life so long as the property is used for residential purposes."

This legislation constitutes a taking of a defeasible fee interest from the landlord, which fee interest is to be used for the benefit of the existing tenant and subsequent tenants.

The United States Supreme Court has held that the deprivation of the owner rather than the accretion of a right or interest by the sovereign constitutes the taking. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311, 156 A.L.R. 390 (1945).

III.

THE LEGISLATIVE DECLARATION OF NEED OR EMERGENCY IS SUBJECT TO JUDICIAL SCRUTINY.

The Supreme Court has long recognized that there is a narrower scope for the operation of the presumption of constitutionality where a specific constitutional provision limits legislative power as distinguished from the general due process requirements. *United States v. Carolene Products Co., supra.*

What is at stake in the instant case is the fundamental right of a citizen to secure ownership of his private property, a right specifically protected by the Fifth Amendment's "public use" limitation. The amendment does not merely regulate the use of private property; it seeks to *appropriate title* to private property. When legislation infringes so fundamental a right, " . . . the usual judicial deference to the legislature is inappropriate." *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). See also, *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

IV.

THE LEGISLATION CONSTITUTES A TAKING.

"If you rent it, you get to keep it, and then sell it."

A. General Discussion Re: The Law of Taking.

It should be parenthetically noted that the court below properly noted that an inadvertent taking is subject to higher scrutiny than a deliberate taking for the obvious reason that different powers are involved, i.e. the police power versus the power of eminant domain. Santa Barbara has not even begun to suggest that it has ever considered paying the respondent for the life estates which this legislation, of necessity, takes from the landlord and gives to the tenants.

The legislation transfers all of the significant value in each mobile home space to the tenants, vests the use of the space in said tenants and their successors, and permanently deprives the plaintiffs of possession of their property.

This legislation and its ensuing scenario are not to be confused with legislating the price of a bottle of milk. The milk purchaser does not get an estate in the milk bottling plant.

Under the guise of regulation a "taking" has occurred with the following pernicious results:

1. The tenant has shortcut the American way of buying and paying for his estate, without the necessity of bothersome details like downpayments, qualifying for financing, making monthly payments, paying taxes and providing upkeep and care;

2. The tenant presently in possession has forever raised the rent on the space by pocketing the windfall when he goes on his way.

For example, when a tenant has sold his mobile home for $50,000.00 in excess of its bluebook value, at today's interest costs, he has added in excess of $500.00 per month to the cost of occupying the space that itself may only rent for $200.00—a 250% increase in effective rent and a perfect example of social Hegelian dialetics, i.e. you often achieve through legislation the precise opposite of your stated goal. It should be noted that while the court invited a closer look at the "rationality of rent control," it was in the footnote and the court in fact did not do it. However, if ever a case called for an examination of the underlying rationale justifying the imposition of the enactment upon the landlord, this one does for the reasons stated above, i.e. the legislation has precisely the opposite effect from its declared purpose. Precisely this kind of analysis was the underlying theme of the court in *Nollan v. California Coastal Commission, supra.* The court examined "the end

advanced as the justification for the prohibition," and concluded:

> " . . . The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than it was . . . 'an out and out plan of extortion.' " — U.S. —, 107 S.Ct. at 3148.

3. The landlord who nominally owns the land receives no part of the $500.00 increase in effective rent, has all of the burdens of continued maintenance, taxes and upkeep, and possesses the land subject to the charge of a life estate or defeasible fee depending on one's analysis.

4. This legislation is nothing more than expropriation, in favor of the tenants and operating against the landlord. It owes its existence to the plain and simple fact that there are more mobile home park renters than there are mobile home park owners. The danger of this form of majoritarian tyranny was addressed by our founding fathers, and the Constitution was created to protect the minority from the excesses of the majority.

> " . . . when a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens . . . . " *The Federalist # 10,* at 104-109 (J. Madison) (Hamilton edition 1868).

Madison stated his concern eloquently at the constitutional convention.

> "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation, in which case the

> rights of property & the public liberty, [will not be secure in their hands] . . . . " The Records of the Federal Convention of 1787, 203-04 (M. Farrand, ed. 1911) (footnotes omitted)

It requires no strain on the imagination to construct the proposition: if this type of legislation is permitted to stand, then no one is safe from expropriation of their property interest by an act of the government. It was to prevent such execesses that the Fifth Amendment was drafted and enacted.

The Fifth Amendment prevents taking for public use without just compensation, and further prohibits the taking, even with compensation, *for private purposes.*

Nothing is clearer in our jurisprudence than that the legislature cannot carve out of existing estates, new estates, *in invitum.* It cannot confer on a tenant an equitable lien or charge against the owner's title, to take effect on expiration of the tenancy. That is confiscation pure and simple. It creates the astounding doctrine that once a tenant, forever a tenant.

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private persons, a servitude has been acquired." *United States v. Dickinson,* 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed.2d 1789 (1947). See also *Dugan v. Rank,* 372 U.S. 609, 625, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

Justice Holmes in *Block v. Hirsh,* 256 U.S. 135, 156, 41 S.Ct. 458, 65 L.Ed. 865 (1921) stated:

> " . . . It may be conceded that *regulations of the present sort (rent control) pressed to a certain height might amount to taking* without due process of law." 256 U.S. at 156. (emphasis added)

Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-416, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321 (1922) wrote:

> "The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking . . . a strong public desire to improve the public condition is not enough to warrant achieving a desire by a shorter cut than the constitutional way of paying for the change . . . "

Justice Holmes also noted that the rent control laws such as those in *Block v. Hirsh, supra,* and *Marcus Brown Holding Co. v. Feldman,* 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877 (1921) "went to the verge of the law" but fell short of being a taking because of the existence of an emergency. 260 U.S. at 416.

The court in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) stated:

> "It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial *public* purpose (citation omitted), or perhaps if it has an unduly harsh impact upon the owner's use of the property . . . " (emphasis added)

In *Agins v. Tiburon,* (1980) 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the U.S. Supreme Court affirmed the California decision holding that although the ordinances limit development, "they neither prevent the best use of appellant's land . . . *nor extinguish a fundamental attribute of ownership. . . .*"

As is evident in the Santa Barbara legislation the owner has lost the right to use the property, to possess

the property, to transfer the property to a buyer of his choice, or to in any way recover possession of the property. Fundamental rights of ownership have been extinguished.

A taking does not become a non-compensable exercise of police power simply because the government in its grace allows the owner some remaining attribute of ownership. "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress,* 243 U.S. 316, 328, 37 S.Ct. 380, 61 L.Ed. 746 (1917); *United States v. Causby,* 328 U.S. 256, 266, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). See also *Goldblatt v. Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

> "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value is, in fact and in law, a 'taking' in a constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed." *2 Nichols on Eminent Domain* (3rd Rev. Ed. 1975) (Taking and Damage, § 6.3, p.65)

B. Elements of Taking:

The legislation in question amounts to a forced grant of a life estate to the tenant presently in possession as well as a forced grant of the remainder to the tenants' successors so long as the plaintiffs utilize their property for residential rental purposes.

1. The Legislation Amounts To A Transfer of An Estate In Land.

For the reasons set forth above the ordinance amounts to a transfer of life estate, at the option of the tenants, at the very least. A correct analysis also recognizes that the remainder interest in the property will vest in subsequent tenants so long as the property is used for residential rental purposes, and that the plaintiff possesses at best a possibility of reverter if the property should cease to be used for residential rental purposes.

2. The Plaintiffs Have Been Permanently Deprived Of Possession Of Their Spaces For The Life Of The Present Occupant, And, Further, Plaintiffs Are Forced To Create Another Life Estate For The Benefit Of Subsequent Tenants So Long As The Property Is Used For Residential Purposes.

The protection of private property rights guaranteed by the Fifth Amendment does not refer to:

> "Vulgar and untechnical senses of the physical thing with respect to which a citizen exercises rights recognized by law . . . (instead it) denote(s) the group of rights inherent in the citizen's relation to the physical thing, it is the right to possess, use and dispose of it . . . the constitutional provision is addressed to every sort of interest the citizens may possess." *United States v. General Motors Corp., supra,* at 377-378.

There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush,* 251 U.S. 182, 187, 40 S.Ct. 113, 64 L.Ed. 215 (1919). Protection of property has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, B & Q Railway Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

The Santa Barbara legislation has destroyed valuable property rights and has resulted in a legal dispossession of the owner. The compulsion placed upon plaintiffs to enter into a lease for a life estate is itself proscribed by the U.S. Supreme Court. See *Munn v. Illinois,* 94 U.S. 113, 127, 133.

The fictitious character of the argument that the landlord may be free to leave the business has long been recognized. See *Charles Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522, 543, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Mora v. Majiss,* 223 F.2d 814 (1st Cir. 1955).

The only compensation the landlord receives for the unconditional surrender of every significant right of ownership is the present value of an inadequate income stream which is accompanied by a *permanent charge* upon the property.

If this legislation does not constitute a taking—the word "taking" should be stricken from the dictionary.

V.

THE FORCED TRANSFER OF THE LIFE ESTATE FROM THE LANDLORD TO THE TENANT WITHOUT JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

A. "Just Compensation" Is The Exact, Monetary Equivalent Of The Property Taken, And "Fair Return" Is Not Synonymous With Just Compensation.

"Just compensation" has been determined by the Supreme Court to mean the full monetary equivalent of the property taken and the owner is to be put in the same position monetarily as he would have occupied if this prop-

erty had not been taken. *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973).

Under ruling California case law the difference between "fair return" and "just compensation" is the difference between "lightning" and "lightning bug."

The test of "just compensation" is a far cry from "fair return" recently approved by the California Appellate Court in *Cotati Alliance for Better Housing v. City of Cotati,* 148 Cal.App.3d 280, 195 Cal. Rptr. 825 (1983), wherein the Supreme Court refused a petition for hearing, and the Appellate Court held that the return to which the landlord was entitled was in essence the original investment of the landlord adjusted for such factors as capital improvement.

The ultimate tests employed, i.e., "just compensation" or "fair return" are dramatically different, and reflect a difference in the source of the rights at issue.

This is not a simple price regulation case. It involves, at the very least, the forced creation and charge upon plaintiffs' property of seventy-one life estates (perhaps defeasible fees) for the benefit and use of private persons. The "fair return" concept has nothing to do with an examination of whether this forced transfer of seventy-one life estates in plaintiff's land constitutes a taking.

Plaintiffs concede that the test of "fair return" (simply the opposite side of the coin of the concept of confiscatory legislation) is an element which must be satisfied under the Fourteenth Amendment due process provision when examining an exercise of police power by the

municipality. The Supreme Court in *Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U.S. 276, 290, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (separate opinion by Brandeis) held that the capital invested by a utility was entitled to a "fair return" when controlled by a regulatory agency through the exercise of the police power of the state. It is equally true that if the police power is exercised without providing for a fair return so that the owner of the property experiences confiscatory results the legislation is then unconstitutional under the due process clause of the Fourteenth or Fifteenth Amendments. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942), 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. —; *Federal Power Commission v. Hope National Gas Co.* (1944), 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

It is also true that while price regulation alone may be constitutionally permissible if a "fair return" is provided for, if such regulation goes too far, if it compels a transfer of an interest in land, if it interferes with the owner's possession, use or exploitation of the property, it can be a "taking" under the Fifth Amendment which is either absolutely prohibited if it involves a transfer from one private person to another, or in the alternative if it is deemed for a public purpose just compensation must be paid.

B. That Plaintiffs Enjoy The Right To Receive Severely Restricted Rents Is Irrelevant To The Taking Issue.

The notion that plaintiffs are somehow compensated for compelled transfer of seventy-one life estates by ren-

tal payments that they received is an outright sham. The amounts received for a "taking for private purposes" if relevant do not even begin to approach what would be the payments on the purchase of the land under the mobile homes.

It must be recognized that plaintiffs are essentially receiving exactly the same rent that they received prior to the creation of the statutory life estate. Thus, they have received no compensation for the transformation of the month-to-month tenancy into a life estate.

While plaintiffs recognize that given the political bent of the city fathers in Santa Barbara they would prefer that the tenants pay nothing for a life estate, the crucial inquiry related to value, if indeed it were a relevant consideration, would focus on questions relating to the economic worth of the right transferred, i.e., in many cases the market has demonstrated that the right transferred was worth at least $50,000.00. Plaintiffs have received not one cent—while single tenants have enjoyed a windfall in excess of $50,000.00 for the rights transferred.

It is a forced transfer of a feast at famine prices.

Obviously, under the circumstances the transfer of a right which has resulted in a monetary benefit to the tenant in excess of $50,000.00 for which the landlord has received nothing does not by any stretch of the imagination constitute "just compensation" or the full monetary equivalent required by the Fifth Amendment as interpreted by the United States Supreme Court.

VI.

RENT CONTROL CAN ONLY BE JUSTIFIED WITHIN AN "EMERGENCY" CONTEXT.

" . . . They [rent control laws] went to the verge of the law . . ." (Justice Holmes, 260 U.S. 393, 416).

A. The Supreme Court Has Always Required That Rent Control Measures Be Temporary And Designed To Meet The Exigencies Created By An Emergency In The Nature Of War Or Other Catastrophe.

Every Supreme Court case that has ever decided the validity of rent control regulation has done so within an emergency context. See *Block v. Hirsh, supra; Marcus Brown Holding Co. v. Feldman, supra; Edgar A. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595 (1922); *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-548, 44 S.Ct. 405, 68 L.Ed. 841 (1924).

In finding that an emergency existed in *Block v. Hirsh, supra,* Justice Holmes was able to fit rent control within the reach of *Wilson v. New,* 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917).

In *Edgar A. Levy Leasing Co., supra* at 245-247, Justice Holmes specifically referred to the emergency, and did not rely on the beliefs of the legislators regarding the existence of the emergency, but buttressed his findings on the housing emergency by pointedly noting that the committees appointed by the governor and the legislature had thoroughly investigated and documented the housing crisis arising out of the war.

The court in *Chastleton* emphasized the need for the emergency requirement otherwise there would have been no reason to remand ". . . to inquire whether the *exigency*

still existed upon which the continued operation of the law depended." *Chastleton Corp. v. Sinclair, supra* at 548.

Justice Holmes in writing the opinion of the court in *Chastleton* stated:

> "We repeat what was stated in *Block v. Hirsh* (cite omitted) as to the respect due to a declaration of this kind of the legislature . . . but even as to them a court is not at liberty *to shut its eyes to an obvious mistake,* when the validity of the law depends upon the truth of what is declared . . . a law depending upon the existence of an emergency or other certain state of facts to uphold it they cease to operate if the emergency ceases or the facts change . . ." 264 U.S. at 547 (emphasis added)

Justice Holmes in characterizing the argument advanced by the defendant stated:

> ". . . The first and most important is the *emergency* that justified interference with ordinary existing private rights in 1919 had come to an end in 1922. . ." 264 U.S. at 546. (emphasis added)

In speaking of rent control provisions upheld in *Block, Marcus Brown* and *Levy,* the court in *State v. Klein,* 63 N.D. 514, 527, 249 N.W. 118 (1933) stated:

> "These measures were held justified *because* of the great national *emergency* caused by the world war; but even then four of the nine members of the court considered the law absolutely unconstitutional, regardless of the safeguards enacted for the protection of the owner." (emphasis added)

The Supreme Court has never overruled the emergency requirement set forth in the above cases. Precisely the contrary is true. After *Nebbia v. New York,* 291 U.S. 501 (1934) and during the period of World War II, emer-

gency housing conditions again compelled resort to rent controls with the federal government imposing them itself.

The Supreme Court after World War II relied on the existence of an emergency, and never reconsidered the constitutionality of rent controls independent of a wartime emergency. In *Woods v. Cloyd W. Miller Co.* (1948) 333 U.S. 138, 141, 68 S.Ct. 421, 92 L.Ed. 596 (1948), the court said:

> ". . . The war power includes the power 'to remedy the evils which have arisen from its rise in progress' and continue for the *duration of the emergency.*" 333 U.S. at 141. (emphasis added)

B. The Emergency Which Justifies The Imposition Of Rent Controls Is In The Nature Of War Or Other Natural Catastrophe—An Emergency Cannot Be Predicted On The Mere Existence Of Inflation Or An Ability On The Part Of The Tenant Population To Meet Rental Payments.

In *Chastleton Corp. v. Sinclair, supra,* the court ruled on an act creating rent control for the District of Columbia and stated:

> "If about all that remains of war conditions is the increased cost of living, that itself is not a justification of the act." 264 U.S. at 548.

In the case of *City of Miami Beach v. Forte Towers, Inc.* 305 So.2d 764 (Florida 1975) at 804, the court declared that an inflationary spiral was not an emergency sufficient to justify rent controls.

In *Warren v. City of Philadelphia,* 387 Pa. 362, 127 A.2d 703 (1956), the court defined emergency as:

> " 'A sudden or unexpected event which creates a temporarily dangerous condition used in necessitating immediate or quick action * * *' and that '* * * Ordinary conditions or customarily existing conditions are not emergencies * * *' " Quoting *Scaccia v. Old Forge Borough,* 373 Pa. 161, 94 A.2d 563 (1953).

In *City of Miami Beach v. Fleetwood Hotel, Inc.* (1972) 261 So.2d 801 at 804 the court stated:

> "In the area of rent control legislation in general, the Supreme Court of the United States has placed severe limitations on the power of the state government in the area of rent control. When such legislation is enacted, deprivation of rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, and freedom to contract are at stake. The only justification for the utilization of such legislation found by the U.S. Supreme Court *is an emergency.* (citation omitted) Emergency has been narrowly defined. *An increase in the cost of living (an inflationary spiral) alone is not sufficient for rent control legislation. . .*" (emphasis added)

The Santa Barbara ordinance was enacted as a response to the loss of low and moderate income housing and scarcity of mobile home spaces (largely a function of regulation by the same municipality, *See,* Comment, Mobile Home Parks and Connecticut's Regulatory Scheme, a Takings Analysis, 17 Conn.L.Rev. 811 (1985).) Further, mobile home parks represent only a small fraction of the housing in Santa Barbara (all of which housing is subject to the same economic pressures) yet mobile home parks are the only part of the housing market subjected to rent controls. This circumstance applies to most of the cities who joined in the amicus brief filed herein.

Despite the existence of these same pressures nationwide, only a few jurisdictions, California being the leading example, have decided in their legislative wisdom to enact rent controls. Obviously, the balance of the country does not believe that a sufficient "emergency" exists to justify the radical solution of rent control.

This Santa Barbara ordinance cannot withstand analysis under an "emergency requirement" and should be held to be unconstitutional.

C. An Essential Corollary To The Requirement Of An Emergency Is That Emergencies End And So Should Controls.

For the Respondents, a necessary corollary of the requirement of the emergency for the imposition of controls is the expectation that the emergency will someday end. Santa Barbara's ordinance holds out no such hope. It is unlikely that substantial new mobile home parks will be built in Santa Barbara so that the "shortage" will end. Over time, most of the mobile home coaches will be sold by their present owners. New coach owners will have paid the old coach owners for the value of the rent controlled space as a part of the purchase price of the coach. Uultimately, the Respondents, or their children, will sell the mobile home park at the depressed economic value that the rent controls inherently cause while their former tenants enjoy the fruits of the Halls' thrift, labor and risk.

VII.

THE NATIONAL SIGNIFICANCE OF THE OPINION BELOW JUSTIFIES THIS COURT'S INTERVENTION AT THIS STAGE OF THE LITIGATION.

Respondent agrees with petitioner's contention on this point.

VIII.

THE FORCED CREATION OF SEVENTY-ONE LIFE ESTATES, WHEREIN THE TENANTS CAN RESIDE ON THE PREMISES FOR SO LONG AS THE PROPERTY IS USED FOR RENTAL PURPOSES, CONSTITUTES A PHYSICAL OCCUPATION.

The only reason that the City can even begin to advance the argument that we are not confronting the "physical occupation," is because so much of our jurisprudence has been blinded by the dogma of the day. The *Nollan* court was precisely on point when it stated:

> "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude (others is) one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " — U.S. at —, 107 S.Ct. at 3145.

Respondent has lost that right with respect to seventy-one tenants. The only cases cited by petitioner are Supreme Court cases decided in an emergency context, and, for the reasons described in detail above, they are not controlling authority.

IX.

SHOULD THE RESPONDENT EXHAUST ADMINISTRATIVE REMEDIES?

Petitioner misapprehends the relief being sought by respondent. We are not seeking a rent increase. We are seeking an invalidation of the law and damages for the temporary taking. In the alternative, let the City act under its power of eminent domain and pay respondent just compensation.

Any remedy which could be obtained under the terms of the Santa Barbara Ordinance is irrelevant to any issue in this case.

CONCLUSION

If the court decides to grant the petition for the writ, then the decision of the court below should be upheld, and, further, the imposition of rent control, absent an emergency, should be declared unconstitutional.

Respectfully submitted,

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